

1820779 (Migration) [2019] AATA 6779 (6 December 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1820779
MEMBER:	Brendan Darcy
DATE:	6 December 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2) of Schedule 2 to the Regulations; and • cl.820.221(2) of Schedule 2 to the Regulations.

Statement made on 06 December 2019 at 10:22am

CATCHWORDS

MIGRATION – refusal – Partner (Temporary) (Class UK) visa – Subclass 820 – the parties were not married to each other – parties are in a de facto spousal relationship – genuine and continuing relationship – substantial corroborative evidence provided – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65, 375, 376

Migration Regulations 1994, rr 1.09, 1.15, 2.03, 109, Schedule 2, cls 820.211, 820.221

CASES

Garcevic v MIAC [2012] FMCA 931

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 8 July 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate had multiple significant concerns that the relationship had been contrived for migration purposes.
4. The applicant appeared before the Tribunal on 19 November 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor claiming to be the applicant's *de facto* spouse and a number of witnesses related to or known to the sponsor.
5. The applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant meets the definition of spouse or *de facto* partner under section 5F or 5CB of the Migration Act and whether the applicant meets subclause 820.211.

Background

8. The sponsor is an Australian citizen who was born [date] in Australia. On Form 40SP she claimed that she divorced her partner [in] December 1998. She claimed to have two children from her previous relationship.
9. The applicant claimed on Form 47SP that he is a Pakistani national who was born in [Pakistan] on [date].
10. On Form 47SP, the applicant claimed that his mother and father and 8 siblings reside in Pakistan. He did not claim to have any children. He claimed that he was previously married to [Ms A] and the relationship ended in divorce [in] January 2013.
11. The applicant arrived in Australia on a [temporary] visa [in] August 2009 and departed [in] August 2009. [In] September 2011 the applicant again travelled to Australia on a [temporary] visa. [In] November 2012 the applicant departed Australia on a Class WB Subclass 020 visa and returned on the same visa [in] December 2012. Since his last arrival the applicant has held two Class WA Subclass 010 visas, the first being valid from 22 May 2013 to 10 January 2014 and the second being valid 25 February 2014 to 18 June 2014. He also held two Class

WC Subclass 030 visas, the first being valid from 9 July 2014 to 12 September 2014 and the second being valid from 12 September 2014 to the present time. According to the delegate's decision, during his time in Australia the applicant has been an unlawful non-citizen for 21 days,

12. On 16 December 2011 the applicant lodged a Class XA Subclass 866 visa. His application was refused by the Department of Immigration on 29 June 2012 and the Refugee Review Tribunal affirmed the decision on 11 April 2013. The applicant lodged an unsuccessful appeal regarding the Tribunal decision in the Federal Circuit Court. He then lodged a further appeal to the Full Federal Court, however withdrew his appeal in 2014.
13. On 2 June 2014 the applicant applied for a Class UK/BS Subclass 820/801 visa, however the application was determined to be invalid.
14. On 8 July 2014 the applicant applied again for a Class UK/BS Subclass 820/801 visa. The Department of Immigration refused to grant the visa on 26 March 2015. The applicant sought review by the Tribunal, differently constituted. On 16 June 2016 the Tribunal remitted the application with the direction that the applicant meets cl.820.211(2)(d) of Schedule 2 to the Regulations.
15. On 13 July 2018 the Department refused the application a second time. According to the delegate's decision, which accompanied the review application, the applicant advised the Department on his protection visa application that he was refused entry to [Country 1] in 2007 and he overstayed his visa in [Country 2] for a year and was deported consequently.
16. The sponsor and the applicant claimed to be married [in] May 2014 which was registered on the relevant authority in the State of Victoria. A marriage certificate is on departmental file¹.
17. At the time of application, the authorised representative for the applicant and sponsor was a registered migration agent or [lawyer].
18. On 31 October 2017 the Department of Immigration sent the applicant an invitation to comment on adverse information letter which included the following information:
 19. *I conducted a telephone interview with your sponsor on 7 September 2017. She stated during the interview that you had a biological child from your previous marriage, a [boy]. She further stated that you communicate with your son via a video program 2-3 times a week. Your sponsor also stated that you provide financial support to the boy.*
 20. *While answering my questions about your family composition your sponsor stated that you had two sisters while in fact you have four.*
 21. *The information you provided in relations to the above matters contradicts your sponsor's statement.*
 22. *Additionally, it came to light during a face to face interview I conducted with you and your sponsor on 26 September 2017 that your sponsor sold her real estate property this year and you had no knowledge of this fact.*
23. On 22 December 2017 the applicant's representative responded to the adverse information letter. The response outlined general comments regarding the telephone interview on 7 September 2017 and addressed the sponsor's evidence about [the applicant]'s son in [Country 3], the sponsor's response to [the applicant]'s family composition and the sponsor's sale of real estate property in 2017. The response also makes submissions regarding the genuine and continuing nature of the relationship, including the financial aspects, the nature of the household, the social aspects of their relationship and the nature of their commitment.

¹[File number deleted] f.70

24. The representative's submission dated 22 December 2017 included the following attachments:
- a) Registered Search Statement stating that both [the applicant] and Sponsors are Joint Proprietors of their property they are residing in
 - b) Tax invoice from their purchase of their home
 - c) [Home] loan agreement
 - d) Copy of [the applicant]'s [Bank] transaction history for period 02 August 2017 - 25 October 2017
 - e) Copy of Ms [C]'s [Bank] transaction history for period 01 July 2017 — 20 September 2017
 - f) Copy of Ms [C]'s [Bank] transaction history for period 03 August 2017 - 30 October 2017
 - g) Ms [C]'s car insurance [with] [the applicant] as listed driver
 - h) Ms [C]'s car insurance [with] [the applicant] as a listed driver
 - i) [Home] and contents insurance for the couple's home
 - j) [Water] bill for the couple's home
 - k) [City] council rate invoice
 - l) Copy of [the applicant]'s [phone] bill
 - m) Copy of Ms [C]'s [phone] bill
 - n) Statutory declaration written and signed by [name deleted] dated 16 November 2017, attesting to the genuine and ongoing married relationship between [the applicant] and Sponsor
 - o) Statutory declaration written and signed by [name deleted] dated 16 November 2017, attesting to the genuine and ongoing married relationship between [the applicant] and Sponsor
 - p) Statutory declaration written and signed by [sponsor's sister] dated 16 November 2017, attesting to the genuine and ongoing married relationship between [the applicant] and Sponsor
 - q) Statutory declaration written and signed by [Mr F] dated 16 November 2017, attesting to the genuine and ongoing married relationship between [the applicant] and Sponsor
 - r) Statutory declaration written and signed by [name deleted], attesting to the genuine and ongoing married relationship between [the applicant] and Sponsor
 - s) Statutory declaration written and signed by [Sponsor's son in law] dated 22 November 2017, attesting to the genuine and ongoing married relationship between [the applicant] and Sponsor
 - t) Marriage certificate
 - u) Various photographs of the couple's wedding together with their family and friends
 - v) Various photographs of Ms [C]'s [birthday] together with the couple's family and friends
 - w) Photographs of Ms [C]'s tattoo with [the applicant]'s [name]
 - x) Photographs of the couple with friends, at Christmas celebrations, at an event
 - y) The couples wedding invitation
 - z) Extract from realestate.com.au showing history of property [address deleted]
25. Other documents provided to the Department included:
- a) Relationship statement (undated) by [the applicant]
 - b) Submission dated 6 October 2014 by the applicant's representative addressing schedule 3 criteria
 - c) Paperwork dated 19 September 2014 regarding the settlement of [another property]
 - d) 4 x [home] loan statements dated 22 September 2014 and 23 September 2014 issued to [Ms C] and [the applicant]

- e) [Electricity] bill due 15 October 2013 to [Ms C]
- f) [Bill] due 21 March 2014 issued to [Ms C]
- g) [Water] bill due 5 August 2013 issued to [Ms C]
- h) [Bill] due 19 February 2014 issued to [Ms C]
- i) [Bill] due 28 March 2014 issued to [Ms C]
- j) Owner's Corporation fee notice issued to [Ms C] on 26 February 2014
- k) Untranslated document titled 'Certificado De Nacimiento'
- l) Reception menu
- m) Purchase register for [Company 1] for the period 1 July 2013 to 28 March 2014
- n) Letter dated 1 April 2014 by [Company 1] confirming [Ms C]'s employment
- o) Australian divorce certificate indicating [Ms C] and [her previous husband] divorced [in] December 1998.
- p) [Travel agent] Invoice issued on 26 March 2014 to [Ms C]
- q) [Bank] account statement dated 7 April 2014 issued to [the applicant] and [Ms C]
- r) [Credit] card statement due 10 April 2014 issued to [the applicant]
- s) [Bank] statement issued to [the applicant] in February 2014
- t) Form 888 by [sponsor's sister] dated 12 June 2014
- u) Form 888 by [Mr F] dated 12 June 2014
- v) Various identity documents

26. The applicant provided a Form 1023 dated 15 June 2018 to notify the Department of incorrect answers. In this form the applicant stated that the incorrect information in this application for a partner visa had been:
- That he was validly married and that he had no children;
 - That he had not visited any countries;
 - That his answers to character declarations were incorrect.
27. According to Form 1023 and the submission by representative dated 3 July 2018, the correct information is that:
- a) The applicant's marriage to the sponsor was void and he is in a *de facto* relationship. The applicant was advised on 20 February 2018 that his marriage to the sponsor was void because he was still married to his previous wife at the time. This situation arose because the applicant misunderstood Australian and [Country 3] law. He believed his divorce took effect [in] December 2011 when he divorced his wife under Islamic law and that registration with the [Country 3] authorities was only a formality. His formal divorce date is [date] May 2014;
 - b) The applicant has one adopted son, adopted [in] July 2008, who remains in the care of his ex-wife. He submits his failure to disclose this information was an unintentional oversight, as evidenced by his protection visa application form and protection visa statement which did disclose his adopted son;

- c) The applicant has made [numerous] overseas trips of less than 12 months in the past 10 years. He submits that he did not intend to withhold this information and it was disclosed to the Department in his protection visa application;
 - d) The applicant was deported from [Country 2] in 2005 when he overstayed his visa and he was denied entry to [Country 1] when he arrived in 2007 with his family for a holiday. He submits that he did not intend to withhold this information and it was disclosed to the Department in his protection visa application;
 - e) The applicant provided one Australian address and one [Country 3] address at which he had lived for more than 12 months in the past 10 years. He submits that he did not intend to withhold this information and it was disclosed to the Department in his protection visa application.
28. The applicant provided the following documents to the Department alongside the Form 1023:
- a) Receipt issued by the Registry of Births, Deaths and Marriages [in] January 2018 showing payment for a marriage certificate and marriage record correction;
 - b) English translation of a divorce certificate indicating that [the applicant] and [Ms A] divorced [in] May 2014. Accompanied by a copy of the original;
 - c) Translated English statement dated 14 February 2018 by [Ms A] saying that she ended her relationship with [the applicant] [in] December 2011, and he orally divorced her on the same date, however she did not register the divorce until [May] 2014. Accompanied by a copy of the original;
 - d) Letter dated [February] 2018 by the Registry of Births, Deaths and Marriages to [the applicant] stating that his marriage registration had been voided;
 - e) Relationship Certificate issued by the Registry of Births, Deaths and Marriages stating that a domestic relationship between [the applicant] and [Ms C] was registered [in] May 2018;
 - f) Translation of a 'Note in the Register of Adopted Children' dated [date] July 2008 indicating [the applicant] has an adopted child. Accompanied by a copy of the original;
 - g) Form 80 completed by [the applicant]; and
 - h) Form 866B and Form 866C completed by [the applicant].
29. The applicant's Departmental file [contains] the following submissions received by the earlier Tribunal in case 1504495:
- a) Submission dated 27 May 2016 by the applicant's representative;
 - b) GP Mental Health Review Treatment Review dated 16 May 2016 for [Ms C];
 - c) Letter dated 23 May 2016 by Dr [H] advising [Ms C] has received regular counselling since May 2015 for treatment of anxiety and panic attacks;
 - d) A letter by [a doctor] dated 16 May 2016 referring [Ms C] for psychological treatment;
 - e) Letter of support dated 20 April 2016 by the General Manager of [Company 1]; and
 - f) Letter of support dated 15 April 2016 by the director of [Company 1].
30. The applicant and sponsor were both interviewed by an official of the Department on 7 September 2017 and 26 October 2017.
31. On 18 November 2019 the Tribunal received the following documents:
- a) Statement of [deleted] dated 12 November 2019;

- b) Letter by Dr [H] dated 13 October 2019 in relation to the sponsor's mental health;
- c) Letter of support [dated] 13 November 2019;
- d) Letter of support [dated] 14 November 2019;
- e) Family ambulance cover for the applicant and sponsor; and
- f) Evidence of a blood donation made by the applicant.

32. On 12 November 2019 the Tribunal received the following documents:

- a) Submission by the representative dated 12 November 2019 addressing the disclosure certificates, evidence given at the previous AAT hearing and the allegation received in relation to the applicant, concerns regarding conflicting information raised by the delegate, the backgrounds of the applicant and sponsor, and information regarding their relationship.
- b) Joint Statement of the Review Applicant and Sponsor dated 12 November 2019
- c) Updated photos of the Review Applicant and Sponsor together with their friends and family (as well as photos already provided to the Department in better quality)
- d) Certificate of relationship dated 28 May 2018
- e) Psychologist report of [Dr H] dated 20 December 2017
- f) Joint [home] loan statement between 1 January 2019 — 28 June 2019
- g) Joint [savings] account statement between 20 January 2019 — 29 July 2019
- h) Sponsor's statement with [bank] evidencing payment of mortgage and utility
- i) Review Applicant's statement with [bank] evidencing deposit of income and regularly withdrawal of cash
- j) Insurance and service tax invoice under the Review Applicant's name for his vehicle
- k) Land title of the couple's home evidencing joint ownership
- l) Various utility bills addressed to the couple
- m) Flight tickets [with] the family for the period 1 March 2019 — 3 March 2019 along with accommodation booking
- n) Flight tickets [with] the family for the period of 9 November 2018 — 11 November 2018 along with accommodation booking
- o) Flight ticket [for] the period of 4 May 2018 — 7 May 2018 along with accommodation [booking]
- p) Statement of [(Sponsor's) sister] dated 12 November 2019
- q) Statement of [Sponsor's] mother) dated 12 November 2019
- r) Statement of [name] (Sponsor's daughter) and [(Sponsor's) son in law] dated 11 November 2019

33. At hearing the applicant provided the Tribunal with the following document:

- a) A letter of support dated 18 November 2019 by the Executive General Manager of [Company 1]

34. On 29 November 2019 the Tribunal received a post-hearing submission. The submission concedes the applicant and sponsor's marriage is void and argues they are *de facto* partners. It addresses the applicant's relationship with Ms [A], the allegation concerning the

applicant, and the sponsor's knowledge of the applicant's language. It advises the applicant believed he held a visa during his stay in [Country 2] and he immediately reported to immigration when he discovered this was not the case.

Non-disclosure certificates

35. An allegation received by the Department is subject to a non-disclosure certificate issued under s.376 of the Migration Act on 28 January 2016 on the basis of revealing the identity of a third party. The Tribunal is satisfied the non-disclosure certificate was validly issued.
36. Folios 169-168 and 148-147 of Departmental file [are] subject to a non-disclosure certificate issued under s.376 of the Migration Act on 30 July 2018.
37. Folio 184 of Departmental file [is] subject to a non-disclosure certificate issued under s.375A of the Migration Act on 30 July 2018
38. During the scheduled hearing, the information under the Act's adverse information provisions was put to the applicant with the sponsor present that an informant had claimed the applicant had been previously been married twice, the first time in Pakistan and the second time in [Country 3], that he had children and that he continues to support these families. A copy of the non-disclosure certificate was provided to the applicant's representative.
39. (An earlier invalid non-disclosure certificate had also been issued but under section 375A. A copy of that was also provided to the applicant's representative.)
40. The applicant responded during the hearing. He denied that he was previously married more than once and informant appeared to be a disgruntled former employee known to both him and the sponsor. He further explained the son belonging to his then [Country 3] wife was adopted and not his biological child and denied continuing to provide money to his divorced wife.

Post hearing submission

41. Also on file is a post hearing submission submitted by the applicant's representative dated 29 November 2019.
42. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or *de facto* partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is [Ms C], born in [Country 4] in [year] and is an Australian citizen by conferral.
43. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

44. If the parties are validly married, they may meet the requirements of a married relationship, but not a *de facto* relationship. While the applicant and the sponsor undertook a wedding ceremony and applied for a marriage certificate which recorded the marriage date as [date] May 2014, the marriage was void when it came to light that the applicant's divorce from a [Country 3] national had not been lawfully completed until [date] May 2014. The applicant has consistently claimed he believed his divorce had taken effect [in] December 2011 when he divorced his wife under Islamic law and that registration with the [Country 3] authorities was only a formality.
45. On the evidence, **the parties were not married to each other** under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Whether the parties are in a de facto spousal relationship?

46. The definition of a de facto partner is given in section 5CB. The applicant's representative has argued that this partner visa application be considered as a *de facto* relationship at the time application and at the time of decision.
47. The parties registered their *de facto* relationship after this application was lodged. The Tribunal finds that they accordingly met r.2.03A(5).
48. Regulation 1.09A makes provisions for determining whether the conditions of section 5CB exist. The Tribunal has accordingly considered whether the following requirements for a spousal relationship are met

Are the other requirements under r.109A(3) for a spouse relationship met?

Financial aspects of the relationship – r.109A(3)(a)

49. The applicant and the sponsor work full time at the same business as a supervisor and as a contractor respectively. There is a joint home loan with a mortgage of around 400,000 Australian dollars. There are no other claimed liabilities. Although the sponsor has experienced some very serious life-threatening events in the last ten years, she had included the applicant in her will or power of attorney. She claims to be leaving her assets at the time being to her children. The Tribunal does not place much weight on this undermining the other more supportive financial aspects of the relationship.
50. Other documentary evidence demonstrated to the Tribunal they jointly pay the mortgage and other bills over a long period of time.
51. It is noted the delegate made adverse findings about a mortgage in the applicant's name that was paid down by the sponsor and the applicant's lack of knowledge about the sale of a house that was in the sponsor's name. Based on the parties' reasonable explanations, the Tribunal finds no adverse inferences on these financial aspects of the relationship.
52. The evidence submitted satisfies the Tribunal that the parties have both sufficiently joined finances and assets for the benefit of the each other.

Nature of the household – r.109A(3)(b)

53. At the time of application, it is accepted that they were residing in the same household for at least six months. There is no evidence they have lived separately for any notable period of time since this visa was lodged. They are both actively engaged in the same business in

different but mutually supportive roles. Cooking, gardening and other household duties are shared, albeit not equally.

54. More impactful has been the ongoing shared care of a number of pets – cats and one dog; and the shared care of the sponsor's mother who has migrated from [Country 4] to Australia following the death of the sponsor's father and who shares the same household.
55. The Tribunal accepts from the evidence that the parties have lived together as spouses and that from the evidence submitted by your witnesses and others that you present as spouses within the household involving the care of pets as well as the sponsor's frail mother.

Social aspects of the relationship – r.109A(3)(c)

56. When evaluating this evidence as supportive of the applicant meeting r.1.90A, the Tribunal found this to be among the strongest element.
57. The sponsor's family and friends have provided statements and oral evidence about this spousal relationship. Most impressive had been the sponsor's daughter as a witness who convincingly outlined the role the applicant plays as a grandfather to the sponsor's grandchildren, including child minding and engaging in outside activities. There was also oral evidence the applicant played a caring role towards the sponsor's increasingly ailing mother who share the household with them, albeit in a limited manner, and that other family members trusted him in that role. The applicant and the sponsor have also holidayed together within Australia with other members of the sponsor's family over the last six years.
58. The Tribunal notes that the applicant's own family has limited exchanges with the sponsor via videoconferencing platforms and that the language barrier was difficult to overcome a level of mutual understanding. Nonetheless, the Tribunal accepts there was a genuine attempt by the sponsor to engage with the applicant's relatives back in Pakistan.
59. This evidence, along with the other witnesses, reflected the applicant is a trusted member of the sponsor's extended family.

Nature of person's commitment to each other– r.109A(3)(d)

60. The parties have claimed that their romantic relationship began at a [function] in 2013 when the applicant confided in the sponsor that his migration status faced an uncertain future unless he applied for an onshore partner visa. Soon after this the relationship involved dating and then cohabitation in a very short period of time. The applicant's visa application for a partner visa occurred while the applicant had appealed to the Federal Court to judicially review a refusal decision for a protection visa, which he later withdrew. This strongly invites a decision maker to conclude that this partner visa under review had been lodged primarily or solely for migration purpose.
61. The Tribunal is further invited to make adverse findings in the context of the applicant's travel and visa history, as well as his former relationships, with particular emphasis on:
 - The applicant's admission that he travelled to [Country 2] for work purposes on a [temporary] visa and that he worked illegally in that country;
 - The applicant unconvincing account of spending almost a year in [Country 2] without knowledge of his migration status, which the Tribunal does not accept;
 - His failed attempt to apply for asylum in [Country 1];
 - His wilful disregard towards declaring in his marital status as 'never previously married' when he was not only previously married but continued to be married;

- His wilful disregard in having incorrect information about his previous marital status and travel history in his visa application for a partner visa;
- His and the sponsor's admission to the department continuing to send remittance to his [Country 3] son, adoptive or otherwise, despite being married to the sponsor; and
- His lack of due diligence in failing to properly and formally divorce his [Country 3] wife before marrying the sponsor.

62. However, the Tribunal accepts that such applications where the primary motive was to achieve a migration outcome do not necessarily exclude the genuine nature of the relationship as on being mutually supportive to the exclusion of all others.
63. The Tribunal also accepts, although it has reached this decision only marginally in favour of the applicant, he was not in a continuing relationship with his previous wife. The Tribunal finds that the applicant's lack of due diligence regarding his marital status as a bigamist was demonstrative of his general lack of respect towards Australia's migration laws. (In this regard, the Tribunal accepts the applicant was not in an even earlier marriage to a woman in Pakistan as claimed by an informant, as raised with the applicant under the Act's adverse information provisions during the scheduled hearing.)
64. However, at the time of decision, there is no evidence that the applicant has lived separately for any notable length of time. They have maintained a relationship while living in the same household for six years. The applicant demonstrated a level of knowledge and empathy towards the sponsor following her [medical] treatments for [a medical condition], as well as when the spouse was involved in [an] accident. The sponsor spoke convincingly about the emotional support she, as a [medical condition] survivor, has drawn from the applicant. They also provided with each other with advice about the business for which they work in a manner common between couples who share a business. As a more mature couple, they understandably do not have plans to have biological children of their own and expressed a determination to share a long term future involving their extended family, travel and mutual support.
65. During the hearing, the sponsor did not demonstrate much interest in the applicant's language, religion or culture. It is open to the Tribunal to put greater adverse weight on some of the lack of understanding or curiosity by the sponsor regarding the aspects of the applicant's identity. However it finds that such an approach would be disproportionate towards of more favourable evidence and findings in this decision.
66. Based on the totality of the relevant evidence, the Tribunal accepts this spousal relationship at the time of application did involve mutual emotional support and real companionship. It further finds that these bonds have strengthened over time. Accordingly, the Tribunal finds that there is sufficient evidence to find that it is a relationship characterised by genuine companionship and respect with a long term future at the time of decision.

Any other circumstances of the relationship

67. The Tribunal is mindful in this matter that in *MILGEA and Dhillon* [1990] FCA 144 (Northrop, Wilcox and French JJ, 8 May 1990) is relevant. *Dhillon* stated at paragraph 458:

68. *It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country"*

69. In *Garcevic v MIAC* [2012] FMCA 931 (Raphael FM, 11 October 2012) at [34], the Court accepted that *Dhillon* and a number of other cases considering repealed provisions requiring a 'mutual commitment to a shared life as husband and wife to the exclusion of others' still represents the law as to what might constitute a married relationship within the meaning of s.5F.
70. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. For this reason an arranged marriage, or a relationship entered into for the purposes of gaining entry into Australia or for some other purpose will not, of itself, fail to meet this requirement, provided both parties have a commitment to a shared life.
71. In this decision, the Tribunal believes considerations about gaining residency within Australia have been a strong feature of this relationship at the time of application. It is noted the sponsor has credibly and convincingly been aware of the applicant's uncertain migration status since the time of the application. She demonstrated detailed knowledge of the applicant's predicament, indicating her ongoing basis for remaining in this relationship includes resolving the applicant's migration status while he continued to send remittances to his former family. Both parties were aware of incorrect information put to the Department in this visa application for a partner visa. The primary, but not sole, purpose of that relationship was to achieve a migration outcome that suited the applicant and the sponsor belonging to the same workplace. Only partially did any romantic, social or companionable aspects of this spousal relationship play a role at the time of application. Critically the Tribunal further accepts that the applicant's account that his relationship with his previous wife ended and that his spousal relationship with the sponsor was to the exclusion of all others.
72. The parties have remained united in this common migration purpose, although the nature of their mutually supportive companionship has developed into a more meaningful spousal relationship, right up until the time of this decision. To this extent, the Tribunal has been able overcome its significant misgivings about the less than commendable approach by both parties in providing incorrect information to the Department and regarding the applicant's irregular travel and migration history.
73. When cumulatively considering the totality of the evidence and accounting the applicant's otherwise disregard for Australia's and other countries' migration laws, the Tribunal assesses that this relationship constituted a genuine spousal relationship at the time of application.
74. In this regard the applicant **satisfies** regulation 1.09A at the time of application.
75. The Tribunal is satisfied that, at the time of application and the time of decision, the applicant and sponsor have a mutual commitment to a shared life as a married couple to the exclusion of all others. The Tribunal is satisfied that the relationship is genuine and continuing. The couple therefore **meet** the requirements of s.5CB(2)(b) and s.5CB(2)(c) for a married relationship.
76. On the basis of the above the Tribunal **is satisfied** that the requirements of **regulations 820.221(2)(a)** was met.
77. The Tribunal is satisfied that at the time of application, and time of decision, the applicant was the spouse of a person who is an Australian citizen, that the applicant was sponsored by that person. The Tribunal finds that there is no evidence before it which indicates that the sponsor was prohibited from being a sponsoring partner under cl.820.211(2B).

78. Noting an earlier Tribunal decision regarding this visa application's Schedule 3 matters, it is furthermore satisfied that the additional time of application sub-criteria – regulations 820.211(2)(c) and 820.211(2)(d) – are met.
79. In light of the evidence presented, the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a genuine and ongoing spousal relationship.
80. Accordingly the applicant meets **cl.820. 211(2)** and **cl.820.221 at the time of decision**.

Conclusion

81. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
82. The parties should be aware that this decision has been reached on only marginally in their favour.

DECISION

83. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221(2) of Schedule 2 to the Regulations.

Brendan Darcy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).